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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 251

ANGELIKA L. SCHNEIDER, PETITIONER

v.

DEAN RUSK, INDIVIDUALLY AND AS SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENT

OPINION BELOW

The opinion of the court of appeals (R. 25; Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1962 (R. 25; Pet. App. B). The petition for a writ of certiorari was filed on July 14, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 352(a)(1) of the Immigration and Nationality Act of 1952—providing for loss of United States nationality by a naturalized citizen

who continuously resides for three years in the foreign state of which he was formerly a national—is constitutional.

STATUTE INVOLVED

Sections 101, 352, and 353 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 170, 269–270, 73 Stat. 274, 8 U.S.C. 1101, 1484–1485, provide in pertinent part as follows:

> SEC. 101. (a) (33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous for the purposes of sections 350 and 352 of title III where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States.
>
> * * * * *
>
> SEC. 352. (a) A person who has become a national by naturalization shall lose his nationality by—
>
> (1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act;
>
> (2) having a continuous residence for five years in any foreign state or states, except as provided in sections 353 and 354 of this title, whether such residence commenced before or after the effective date of this Act.
>
> * * * * *

SEC. 353. Section 352(a) shall have no application to a national who—

(1) has his residence abroad in the employment of the Government of the United States; or

(2) is receiving compensation from the Government of the United States and has his residence abroad on account of disability incurred in its service; or

(3) shall have had his residence in the United States for not less than twenty-five years subsequent to his naturalization and shall have attained the age of sixty years when the foreign residence is established; or

(4) had his residence abroad on October 14, 1940, and temporarily has his residence abroad, or who thereafter has gone or goes abroad and temporarily has his residence abroad, solely or principally to represent a bona fide American educational, scientific, philanthropic, commercial, financial, or business organization, having its principal office or place of business in the United States, or a bona fide religious organization having an office and representative in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation; or

(5) has his residence abroad and is prevented from returning to the United States exclusively (A) by his own ill health; or (B) by the ill health of his parent, spouse, or child who cannot be

brought to the United States, whose condition requires his personal care and attendance: *Provided,* That in such case the person having his residence abroad shall, at least every six months, register at the appropriate Foreign Service office and submit evidence satisfactory to the Secretary of State that his case continues to meet the requirements of this subparagraph; or (C) by reason of the death of his parent, spouse, or child: *Provided,* That in the case of the death of such parent, spouse, or child the person having his residence abroad shall return to the United States within six months after the death of such relative; or

(6) has his residence abroad for the purpose of pursuing a full course of study of a specialized character or attending full-time an institution of learning of a grade above that of a preparatory school: *Provided,* That such residence does not exceed five years; or

(7) is the spouse or child of, or has a son or daughter who is, an American citizen, and who has his residence abroad for the purpose of being with his American citizen spouse, parent, or son or daughter who has his residence abroad for one of the objects or considerations specified in paragraphs (1), (5) or (6) of this section, or paragraph (2) of section 1486 of this title; or

(8) is the spouse or child of an American national by birth who while under the age of twenty-one years had his residence in the United States for a period of [or]

periods totaling ten years, and has his residence abroad for the purpose of being with said spouse or parent; or

(9) was born in the United States or one of its outlying possessions, who originally had American nationality and who, after having lost such nationality through marriage to an alien, reacquired it; or

(10) has, by Act of Congress or by treaty, United States nationality solely by reason of former nationality and birth or residence in an area outside the continental United States; *Provided*, That subsections (b) and (c) of section 404 of the Nationality Act of 1940, as amended (8 U.S.C. 804 (b) and (c)), shall not be held to be or to have been applicable to persons defined in this paragraph.

STATEMENT

Petitioner was born of German parents on May 28, 1934, in Bavaria, Germany, and came to the United States in 1939. Her mother was naturalized as a United States citizen in 1946. Her father was naturalized as a United States citizen on December 4, 1950, which conferred on petitioner derivative citizenship. In 1956, petitioner left the United States to marry a German citizen in Germany, and has resided there continuously with the exception of a visit of about six weeks' duration in the United States in 1957. She intends to continue to live in Germany (R. 2, 16–17). Petitioner's sons, who were born in Germany in 1957 and 1958, acquired German nation-

ality by reason of the father's citizenship, and have been registered by petitioner with the United States consulate as United States citizens under Section 301(a)(7) of the Immigration and Nationality Act of 1952 (R. 17).

In 1959, the United States denied further extension of the series of passports which petitioner has held since 1954. The State Department certified that petitioner had expatriated herself under Section 352(a)(1) of the Act by continuous residence for three years in the foreign state of which she was a national prior to naturalization as a United States citizen (R. 12–C, 17–18).

Petitioner, on February 1, 1960, filed a complaint in the United States District Court for the District of Columbia to enjoin respondent's predecessor from enforcing Section 352(a)(1), and to declare petitioner a citizen of the United States (R. 1–5). The district court entered judgment for the respondent on the pleadings (R. 24). The court of appeals affirmed, *per curiam*, citing *Lapides* v. *Clark*, 176 F. 2d 619 (C.A. D.C.), certiorari denied, 338 U.S. 860 (R. 25).[1]

ARGUMENT

1. Petitioner challenges the constitutionality of Section 352(a)(1) of the Immigration and Nationality Act (*supra*, p. 2) which provides that a naturalized

[1] The decision in the court of appeals had been postponed pending the decision by this Court in *Rusk* v. *Cort*, 369 U.S. 367, as to whether the distict court had jurisdiction of the suit instituted by petitioner while she remained abroad. This Court denied a petition for a writ of certiorari prior to judgment in the court of appeals. 366 U.S. 963.

citizen returning to his native land expatriates himself after continuous residence for three years unless he falls within certain defined exceptions included in Section 353 (*supra*, pp. 3–5).[2] Petitioner contends that the statute bears no reasonable relationship to the power of the Congress with respect to international relations and unlawfully discriminates against naturalized citizens. She also contends that the statute is unconstitutional because it constitutes cruel and unusual punishment. The government, on the other hand, submits that the court of appeals was correct in holding that the statute was constitutional on the ground that it is reasonably related to the power of Congress over foreign affairs.

Although, as noted in point 2, *infra*, pp. 15–16, we do not oppose issuance of a writ of certiorari in this case, we set forth for the Court's consideration our reasons for believing that the decision below is correct.

a. This Court in *Perez* v. *Brownell*, 356 U.S. 44, upheld the power of Congress to provide for expatriation as the result of a voluntary act which Congress reasonably finds may embarrass the conduct of foreign relations or embroil the United States in international disputes. Congress has long regarded the residence of a naturalized citizen in the country of his birth as such a problem and has tried various ways of dealing with it. Many treaties concluded by the United States with foreign nations provided and still provide for loss of citizenship by a United States naturalized

[2] Section 352(a)(2) provides that a naturalized citizen loses his citizenship if he has continuous residence abroad for five years in any other foreign state.

citizen who reestablishes residence in his country of origin. *Perkins* v. *Elg*, 307 U.S. 325; Van Dyne, *Naturalization* (1907), p. 335. By executive policy, formulated prior to legislative action, diplomatic protection was denied to naturalized citizens who abandoned their domicile in the United States. See 3 Hackworth, *Digest of International Law*, pp. 286–288. In 1906 Congress provided by Section 15 of the Act of June 29, 1906, 34 Stat. 601, that the naturalization of a person who established permanent residence in a foreign country within five years after his naturalization should be deemed presumptively fraudulent and subject to revocation. The constitutionality of this enactment was sustained in *Luria* v. *United States*, 231 U.S. 9. In Section 2 of the Act of March 2, 1907, 34 Stat. 1228, Congress provided that:

> When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen * * *.

Section 404(c) of the Nationality Act of 1940 was therefore not a fundamental departure from prior

[3] See the following treaties or conventions: Albania, 49 Stat. 3243 (1932); Belgium, 16 Stat. 748 (1868); Costa Rica, 37 Stat. 1604 (1911); Czechoslovakia, 46 Stat. 2425 (1928); Denmark, 17 Stat. 943 (1872); Salvador, 35 Stat. 2039 (1908); Haiti, 33 Stat. 2102 (1902); Honduras, 36 Stat. 2161 (1908); Lithuania, 53 Stat. 1570 (1937); Nicaragua, 37 Stat. 1561 (1908); Norway, 17 Stat. 812–813 (1869); Peru, 36 Stat. 2182 (1907); Portugal, 35 Stat. 2083–2084 (1908); Sweden, 17 Stat. 812–813 (1869); Uruguay, 36 Stat. 2166 (1908); Argentina, Chile, Colombia, Costa Rica, Ecuador, Salvador, Honduras, Nicaragua, Panama, 37 Stat. 1655 (1906).

law. Rather, this provision was a new remedy for dealing with an old problem in international relations. Before enactment of the Nationality Act of 1940, Congress was told that the methods theretofore used—administrative or statutory withdrawal of diplomatic protection and statutes raising merely evidentiary presumptions—had proved unsatisfactory.[4] Naturalized citizens who returned to live in their country of birth were a continuing source of demands for protection and service from the United States government and were a "constant source of irritation."[5] Many such naturalized citizens also had children who acquired United States citizenship by birth and, in many instances (as in this case) the nationality of the foreign state as well, thus raising the possibility of embroiling the United States government in controversies with the government of the country in which they resided.[6] Moreover, Congress believed:[7]

> [A] definite provision for the termination of American nationality in these cases will have the effect of persuading foreign states with which the United States has no treaties of naturalization to conclude such treaties and to recognize the American nationality of the persons

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[4] Hearings before Committee on Immigration and Naturalization on H.R. 6127, superseded by H.R. 9980 [hereinafter Hearings], 76th Cong., 1st Sess., pp. 135, 409.

[5] Hearings, pp. 495, 241; S. Rep. 2150, 76th Cong., 3d Sess., p. 4.

[6] Hearings, p. 407; S. Rep. 2150, 76th Cong., 3d Sess., p. 4.

[7] Hearings, p. 495.

> concerned when they return to their countries of origin for *legitimate* objects and for residence of a temporary character. [Emphasis added.]

In short, there has been, and continues to be, a substantial problem in the conduct of foreign affairs resulting from the return of naturalized American citizens to their native lands. Section 404(c) of the Nationality Act and its successor, which is involved in this case, represent a Congressional judgment as to the appropriate remedy.

b. Petitioner argues that, nevertheless, the statute is invalid because it makes a distinction between naturalized and native-born citizens. There is, however, considerably greater likelihood that international complications will arise when a naturalized citizen returns for permanent residence in a foreign country, particularly when it is the country of which he formerly was a national. A naturalized citizen in his former homeland is far more likely to be involved in the affairs of the foreign country, and to be treated by the foreign country as its own national (for example, for purposes of taxation and military service), for in that situation there is an obviously intimate relationship to the country. Consequently, for about one hundred years, naturalized and native-born citizens have been subject to different standards in regard to expatriation. See *Perez* v. *Brownell,* 356 U.S. 44, 49.

It is of course true that international problems may be caused by citizens born in the United States who

reside abroad for an extended period. But Congress may legislate for one evil at a time and may decline to legislate concerning other conduct it does not deem of equal danger. See *United States* v. *Petrillo*, 332 U.S. 1; *Hirabayashi* v. *United States*, 320 U.S. 81, 100; *Patsone* v. *Pennsylvania*, 232 U.S. 138, 144. On the basis of evidence it deemed satisfactory, Congress restricted Section 352, unlike other expatriation provisions,[8] to naturalized citizens, because foreign residence by such groups had more possibility of producing international disputes. The judgment, we believe, was reasonable and within the exclusive competence of the Congress.

The fact that not every naturalized citizen returning to his country of origin causes international difficulties also does not negate the validity of the congressional judgment that the problem is sufficiently serious to require legislative action. It would be virtually impossible to separate out those naturalized citizens who will cause international problems from those who will not. Congress has exempted from the operation of the statute several categories of aliens who are least likely to cause international complications by residing abroad—for example, the elderly and ill, and those employed by the government of the

[8] Where a citizen's conduct in a foreign country will not, in ordinary experience, have a different effect whether naturalized or born in the United States, no differentiation has been made. For example, voting in a foreign election terminates citizenship by birth just as by naturalization. See *Perez* v. *Brownell*, 356 U.S. 44.

United States or by American business concerns (see *supra*, pp. 3–5). It was not required to make further minute distinctions.

Nothing in the Constitution prohibits differentiation between natural-born and naturalized citizens on a reasonable basis. Indeed, the Constitution itself embodies differences based on citizenship at birth, *e.g.*, the limitation of eligibility for the Presidency to "natural born" citizens. Art. II, Sec. 1. And a naturalized citizen must wait seven years before he is eligible to sit in the House of Representatives (Art. I, Sec. 2) and nine years before he can sit in the Senate (Art. I, Sec. 3).

In short, since there is a reasonable basis for treating naturalized citizens differently from native born with respect to the effect of residence abroad, there is no constitutional infirmity in the legislation. The legislative process permits varying treatment of different groups in order to accomplish substantial public purposes. *Truax* v. *Corrigan*, 257 U.S. 312, 337. Classification is a perfectly permissible device; only unreasonable classifications are unconstitutional. *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410; *Clarke* v. *Dekebach*, 274 U.S. 392. On many occasions, this Court has upheld differentiations in treatment affecting various groups of citizens and residents, upon a showing that the classification was reasonably devised to meet a demonstrated need.[9]

[9] *Terrace* v. *Thompson*, 263 U.S. 197; *Heim* v. *McCall*, 239 U.S. 175; *Patsone* v. *Pennsylvania*, 232 U.S. 138; *Porterfield* v. *Webb*, 263 U.S. 225; *Cockrill* v. *California*, 268 U.S. 258; *Clarke* v. *Dekebach*, 274 U.S. 392; *Mackenzie* v. *Hare*, 239 U.S. 299; *Savorgnan* v. *United States*, 338 U.S. 491.

c. Petitioner suggests (Pet. 14), citing the opinion of the Chief Justice in *Trop* v. *United States*, 356 U.S. 86, 97, that Section 352 is unconstitutional because it constitutes cruel and unusual punishment. In *Trop*, however, the act of deserting the armed forces was itself a crime. The Chief Justice stated that the only purpose of denationalization was additional punishment and therefore the statute was unconstitutional under the cruel and unusual punishment clause of the Eighth Amendment. In contrast, in *Perez* v. *Brownell*, 356 U.S. 44, the Court upheld a section of the Nationality Act of 1940 providing for the expatriation of citizens voting in foreign elections. The Court reasoned that the statute was a reasonable exercise of Congress' power over foreign affairs in that it was designed to prevent international problems arising when American citizens voted in elections in other countries.

Section 352(a)(1), like the provision involved in *Perez* and unlike that in *Trop*, does not base expatriation on criminal conduct. Petitioner's return to live in Germany was obviously not a crime and her expatriation was not an attempt to punish. Instead, as in *Perez*, Congress passed Section 352(a)(1) as a reasonable exercise of its broad power over foreign affairs in order to avoid continuing international difficulties.

d. The decision in *Lapides* v. *Clark*, 176 F. 2d 619 (C.A. D.C.), certiorari denied, 338 U.S. 860, sustained the constitutionality of Section 404(c) of the Nationality Act of 1940, the almost identical predecessor to Section 352 of the 1952 Act, which is involved

in this case."[10] Both sections provide for expatriation upon prolonged stay of a naturalized person outside the United States; Section 404(c) of the 1940 Act required five years' residence in any foreign country; Section 352(a)(1) applies to three years' residence in the country of the naturalized citizen's birth or former nationality. *Lapides* v. *Clark* has been favorably cited in several subsequent decisions of this Court and of the courts of appeals. See *American Communications Ass'n.* v. *Douds*, 339 U.S. 382, 391; *United States* v. *Bendik*, 220 F. 2d 249, 252 (C.A. 2); *Societe Internationale* v. *Brownell*, 225 F. 2d 532, 540 (C.A. D.C.), reversed on other grounds, 357 U.S. 197."[11]

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[10] Petitioner suggests (Pet. 14, note 5), that *Lapides* v. *Clark* holds that Section 404(c) created only a presumption that prolonged residence abroad is inconsistent with continued allegiance to the United States and that, as so construed, Section 404(c) is constitutional. It is clear, however, from the language of Section 404(c) that a naturalized citizen residing abroad for five years loses his citizenship regardless of his subjective allegiance. The most that the portion of *Lapides* v. *Clark* relied on by petitioner indicates is that, if a naturalized citizen attempts to return to the United States within five years and through no fault of his own cannot do so, application of the statute to him might be arbitrary and unconstitutional. Even if that faint suggestion is correct, it has no application to this case; petitioner does not claim that after leaving the United States in 1956 to take up residence in Germany, she has ever attempted, or even intended, to resume residence in this country.

[11] Only shortly prior to the decision of the District of Columbia Circuit in *Lapides* v. *Clark*, the Second Circuit reached the same result in a habeas corpus proceeding, involving the same plaintiff, without discussing the issue of constitutionality. *Lapides* v. *Watkins*, 165 F. 2d 1017.

And *Lapides* has been expressly followed in three district court decisions considering the provisions of either the 1940 or 1952 Acts. *United States v. Cuccaro*, 138 F. Supp. 847, 856 (E.D. N.Y.); *Rosasco* v. *Brownell*, 163 F. Supp. 45, 57 (E.D. N.Y.); *Guerrieri* v. *Herter*, 186 F. Supp. 588, 590 (D. D.C.), affirmed, 283 F. 2d 368 (C.A. D.C.). *Lapides* v. *Clark* was also cited in Senate Report No. 1515, 81st Cong., 2d Sess. (April 20, 1950), p. 753, the comprehensive study which underlay the Immigration and Nationality Act of 1952. The report recommended tightening of Section 404(*c*) of the 1940 Act with respect to brief interruptions of the residence abroad, and recommended liberalization by means of numerous exceptions, *e.g.* the case of a person living abroad because of the ill health of a parent, spouse, or child (*id.* at pp. 767–768).

2. We have contended above that the court of appeals was correct in holding that Section 352(a)(1) is constitutional. The issues in this case are, however, of considerable importance both to the United States and to its naturalized citizens. The State Department reports that, during a recent twelve-month period, it made 1065 determinations of loss of nationality under Section 352(a)(1). In addition, it made 179 determinations of loss of nationality under Section 352(a)(2), *supra*, which provides that a naturalized citizen expatriates himself if he has continuous residence abroad for five years, regardless of the particular country involved.[12] While we believe that

[12] These 1244 determinations of loss of nationality under Section 352 as a whole resulted from 12,547 adjudications.

the decision below was correct, because of the importance of the issues presented respondent does not object to the granting of a writ of certiorari.

3. It should be noted, although the point is not raised in the petition,[*] that a question of statutory interpretation may be involved in the case. Petitioner returned to the United States for six weeks to visit her parents during the three-year period on which respondent based his determination of loss of nationality. This visit would not seem to interrupt petitioner's residence in Germany since residence is defined in Section 101(a)(33) of the Act, *supra*, p. 2, as "the place of general abode," *i.e.*, the "principal, actual dwelling place in fact, without regard to intent. Residence shall be considered continuous * * * where there is a continuity of stay but not necessarily an uninterrupted physical presence in a foreign state or states or outside the United States." Despite this definition, however, it has been held, in a case involving Section 352(a)(2), that visits of eleven weeks and three weeks to the United States for purposes of study during a five-year period broke continuous residence abroad. *Guerrieri* v. *United*

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[*] The issue was also not raised in the district court. In the court of appeals, petitioner's main brief merely noted the six-week visit to the United States and indicated that this did not break her continuous residence abroad (p. 31). In her reply brief in that court, she stated that the *Guerrieri* decision, if applied to her case, would mean that she had not had continuous residence abroad for three years.

States, 186 F. Supp. 588 (D. D.C.), affirmed on the opinion of the district court, 283 F. 2d 368 (C.A. D.C.). We believe that this decision is incorrect because it is inconsistent with the clear definition of residence in the statute and that, furthermore, it does not cover the single six-week visit in this case.

Respectfully submitted.

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